MISCELLANY.

The Track of the Deodand.—An auto kills a negro boy. In subjecting the machine to the statutory lien for damages the Tennessee Court of Civil Appeals draws counsel from the doctrine of deodand —an early concept of the liability for accidental death. Perhaps the judge who wrote the opinion had in mind the case of The Queen *v.* The Eastern Counties R. Co. (1842; 10 M. & W. 58), wherein it appeared that one William Austin "accidentally, casually, and by misfortune came by his death," and that a steam engine "was moving to the death of the said William Austin." Furthermore, it appeared that three other persons had been killed, and the only question presented to the court was whether, on the record, the railroad was liable to forfeit the value of four steam engines or only one. The court took the safe side, but pointed out that if the same engine was responsible for the four deaths, the company could clear its liability by giving up that engine.

This steam engine case, however, presents the idea of deodand in what might be termed its most enlightened, certainly its most thrifty, stage, where there is no destruction of a useful article, but merely a forfeiture of its value. If we wish to trace this curious maxim of liability back to its origin, we shall find that, in the absence of an understanding of personal responsibility for tortious death, man first attached blame to the thing that immediately occasioned loss of human life, although such loss was entirely accidental. The tree which fell on a man or against which he was thrown, the horse which threw its rider, or the cart which ran over a person,—any such chattel, whether animate or inanimate, which occasioned the death of a human being was condemned; and primitive man punished it even as modern man, yielding to primitive impulse, punishes at times a harmless collar or an innocent chair. The origin of the doctrine, not explained by the idea of enforcing moral responsibility, seems to be likewise free from any effort to exact pecuniary recompense. Thus, where a man was drowned in a well, the well was ordered to be filled up. And the sword that occasioned death was forfeited, although it had belonged to the man who was killed. In ignorant fear or blind revenge the thing that became the instrument of death was made to perish without regard for the recovery of "damages."

But such a procedure could not hope long to escape the vigilance of the taxing power, which, whether in monarchy or in democracy, is ever seeking, like Noah's dove, a green bough on which to light. The King therefore stepped in, perhaps not altogether on the principle that might is right, but basing his claim on the proposition that the death of the person was an offense against the soveriegn rule which should be atoned for not by a destruction of the offend-

ing chattel but by its forfeiture to the King. Just at this point is seen the opening of the way for a forfeiture of the value of the thing instead of the thing itself. For "the jingle of the guinea helps the hurt that honor feels." After a while, however, the Church outwitted the King in the contest for the proceeds of the penalty, placing its right on the unimpeachable ground that where a man suffered violent death he died in sin, and it was necessary to pray his soul out of perdition—what more appropriate funds therefor than those derived from the chattel that occasioned the casualty? Obviously, it was at this stage of the development of the doctrine that the name deodand (given to God) was applied. Concerning the deodand, Blackstone says: "It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church (Fitzh. Abr. tit. Enditement, pl. 27; Staunf. P. C. 20, 21); in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. As this may account for that rule of law that no deodand is due where an infant under the age of discretion is killed by a fall from a cart, or horse, or the like, not being in motion (3 Inst. 57; 1 Hal. P. C. 422); whereas, if an adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by Sir Matthew Hale seems to be very inadequate, viz.: because an infant is not able to take care of himself; for why should the owner save his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to have been that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses; but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law."

The King, although at first baffled by the "pious use" slogan, finally got around it by retaining the ostensible purpose of "pious use" while he actually appropriated the revenue according to his fancy. Apparently the deodands were victims of a clear case of graft, or in the dignified words of Blackstone, a "perversion of their original design."

The doctrine of deodand belonged distinctly to an age when moral responsibility was not apprehended. With a quickening of the sense of this responsibility and a broadening view of the truth, the doctrine inevitably was cast aside. It was understood to be faulty long before it was discarded. Thus Blackstone introduces the idea of the negligence of the owner of a cart in running over a child as an "additional reason" for the forfeiture of the cart; and

he also speaks of the "inequitable" claim for the value of a boat from which a man has perished, and says that juries frequently found that some trifling thing, or a part of a thing, was the occasion of the death, and although such a finding was hardly warrantable by the law (the vessel and cargo being in strictness of law a deodand) yet the court of King's Bench generally refused to interfere with the finding on behalf of the lord of the franchise. Here it should be mentioned that the common law courts could enforce the forfeiture of a boat only when the casualty occurred in fresh water (1 Blackstone Com., p. 302). It seems, however, that when the accident occurred on the high seas the forfeiture was nevertheless enforced, although in a different court (Holmes, The Common Law, page 26). The doctrine of deodand lived to collide with a railway engine, as we have already noted; and although it conquered that particular engine we may imagine that it received its death blow in the collision, for it was abolished by statute shortly afterward (Stat. 9 & 10 Victoria, c. 62).

Such was the doctrine of deodand. Quaint and unseemly it appears in the light of the modern law of negligence and industrial liability. But truth is laboriously learned and justice haltingly comprehended. The early law could reach the unmistakable object, such as an ox or a tree; present law can enforce the responsibility of the personal agent in the unmistakable act of negligence when an automobile runs down a child or a factory fire burns women and girls to death. But we have not yet learned to remedy countless numbers of social and industrial wrongs; and we still proceed against artificial legal entities, as against a cart or a mill-wheel, for the palliation of evils which can be corrected only by holding persons accountable. In contemplating the limits of present methods, we more willingly accord to the old deodand its place in the history of law.

What of the deodand in modern jurisprudence? Does it leave its mark on prevailing rules or illumine present thought? The reader has, perhaps, already connected the old summary action against irresponsible things with the later proceedings against ships, wherein the ship, forming both the security for its owner's debt and in some cases the limit of his liability, may, by a jumble of ideas, be regarded as the thing primarily responsible (see Harmony *v.* U. S., 2 How. (U. S.) 210). Of course, however, the principles of maritime law rest on reasons of necessity and public policy quite apart from any historical association that they may have with the idea of deodand. In cases other than admiralty, the old doctrine has recently been referred to. In Daniels *v.* Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997, the court, in considering the constitutionality of a statute regulating fishing and authorizing the seizure of nets unlawfully used, said: "The plaintiff contends that though his prop-

erty is admitted by him to have been used in violation of law at the time of seizure, that the statute imposing as a penalty the loss of such property is unconstitutional in that there was no previous notice and trial. But as the General Assembly could prescribe the loss of the nets as a penalty, and the offense is admitted, there is nothing to try. As was said in Rea *v.* Hampton, 101 N. C., at p. 55. 'As the legislature had the undoubted right to regulate the manner in which the right of fishing in Albemarle Sound should be exercised, the plaintiffs had no right to fish in its waters in any mode not allowed by law. The facts found show that they were fishing in violation of law, and it would be singular if they could ask the law to protect them in its violation.' In Rose *v.* Hardie, 98 N. C. 44, a town ordinance was held valid which authorized all hogs running at large to be impounded and sold for the costs and penalty. Here the State made the penalty the forfeiture of the article used in violation of the act. In Mowery *v.* Salisbury, 82 N. C. 175, a town ordinance was sustained which made the penalty for failure to pay the tax on a dog the right to kill the dog. At common law, any personal chattel that even accidentally caused the death of a rational being was forfeited to the sovereign and sold, and the proceeds distributed to the poor, as a cart that ran over a person, a weapon and the like. They were styled deodands. 1 Blk. Com. 300. And no trial or conviction of any person was necessary."

Again, in the Tennessee case heretofore mentioned, the doctrine of doedand was considered. The question presented to the court was whether a statutory lien on an automobile for the negligence of its driver was superior to the right of a conditional vendor. The intermediate appellate court said: "The legislators intended to make the claim of the injured one superior to that of any other person who asserts a lien or a charge, and that the claim of the injured one should be enforced against any owner who in any manner consented that the one who inflicts a harm might use the machine. It is clear that this was the legislative design. Did the legislature, when it so provided, go beyond any recognized principle of jurisprudence or of legislation? We can best answer this question by tracing the history and development of the idea of responsibility for injuries done by dangerous or quasi-dangerous instrumentalities. This is known as the doctrine of deodand. Practical lawyers may scorn this method of treating of intricate questions if they want to. We are persuaded that this is the only broad, logical, and jurisprudential way of solving propositions that are now in the realm of debate. Analogy is still the great light, and history is a luminary of almost equal force. And it must not be forgotten that numberless rules of the ancient common law are operative today, and that juridical concepts are so persistent as to come to life and illuminate questions arising in ages far distant from their origin." But the

Supreme Court, siding with the "practical lawyers," refused to solve the question according to the "broad, logical, and jurisprudential way." It said: "To the credit of American jurisprudence, from the outset the doctrine (of deodand) was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country. In this state, we have a positive denunciation of its principle firmly embedded in the fundamental law. The Constitution of 1870 provides: 'No corruption of blood or forfeiture of estates; no deodands. That no conviction shall work corruption of blood or forfeiture of estate. The estate of such persons as shall destroy their own lives shall descend or vest as in case of natural death. If any person be killed by casualty, there shall be no forfeiture in consequence thereof.' Article 1, § 12. We are at a loss to understand why a doctrine, so discarded and denounced, was thought to buttress, by analogy or otherwise, the position so taken; and we are at an equal loss to understand how it sheds light on the law of dangerous instrumentalities when the less harmful were equally included for forfeiture under the doctrine referred to. The doctrine of deodand did not at all proceed upon the basis of the instrumentality being a dangerous one. Besides the statute here under review is not that undertakes to provide for a forfeiture of the thing—the automobile—dangerous or not. Its plain meaning is that for damages (not measured by the value of the machine) consequent on negligence or wilful violation of its provisions, an action lies. In view the question is capable of solution by a resort to rules that are fairly familiar, and certainly more obviously applicable." Parker-Harris Co. *v.* Tate (Tenn.), 188 S. W. 54. In addition to Tennessee, the following states, by constitutional provision, have prohibited deodands:

Delaware ("if any person be killed by accident, no forfeiture shall be thereby incurred," art. 1, § 15); Kentucky ("if any person shall be killed by casualty, there shall be no forfeiture by reason thereof," § 21); Missouri (similar to Ky. provision, art. 2, § 13); New Hampshire ("nor shall any article which shall accidentally occasion the death of any person be henceforth deemed a deodand, or in any wise forfeited on account of such misfortune," part second, art. 89); Pennsylvania (similar to Ky. provision, art. 1, § 19); Vermont (similar to N. H. provision, chap. 2, § 38).

Abolished by statute, barred by constitution, the deodand is gone. Courts may refer to it and analogies may be drawn from it; but the deodand—the accursed thing, stained with the guilt of accidental death—can no more be revived than can the days of simple manners and elementary thought of which it was a creature. If perchance the current of life, after multitudinous windings, brings us in line at some point with the ancient landmark and some combination of

conditions imposes upon modern law the print of the old concept, the new rule must bear its own reason and find its justification in the life to which it applies.—S. W. W. in Law Notes.

The Law of Accretion and the Missouri River.—All dwellers along the Missouri river know that its erosions have been as deep as a mile or 2 miles into the concave bank, with a corresponding accretion on the point opposite and below, and all of them know that this is only a preparation for an avulsion when the river forms an "ox-bow" narrow enough to cut across. The erosion and the avulsion, states George F. Longsdorf in the April Case and Comment, are but phases of a single phenomenon, yet in the same cases the court held that land was lost and gained and boundaries changed by the erosion and accretion, but not by the avulsion and reliction that completed the phenomenon. See Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 33 L. Ed. 872, 10 S. Ct. 518, affirming 40 Fed. 389; Nebraska *v.* Iowa, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396. All the lands along the Missouri are surveyed and patented by the United States by rectangular lines. Any competent surveyor can retrace those lines with substantial accuracy. Yet, by these decisions and the changing of the river, the boundary of Iowa crept into the Nebraska shore for a mile or more, and the titles on one side were lost to be gained by accretion on the other; while finally, when the avulsion came, it left an irregular and inaccessible piece of Iowa on the West bank of the Missouri river, with a boundary by courses and distances. There are many similar pieces of land along that river, some on one side, some on the other side, and some that have been on both sides. Most of them are a No Man's Land, unowned, untaxed, unruled by either state, and for that matter unruly. As lawyers and citizens the law must be accepted as declared. Perhaps the precedents commanded the decision. Seemingly they did. Yet "all dwellers on the banks of the Missouri" may believe that a better applied scientific knowledge of the physical facts would have enabled the court to avoid so inconvenient and confusing a result.

Judge McCoy of the Supreme Court of South Dakota, in the case of Maw *v.* Bruneau, 156 N. W. 792, for the purpose of illustrating the natural and well-known changing and varying conditions of the river, but not the law; quotes a noted humorous author, who described its habits and characteristics and the law governing accretion as follows:

"It is a perpetual dissatisfaction with its bed that is the greatest peculiarity of the Missouri. It is harder to suit in the matter of beds than a travelingman. Time after time it has gotten out of its bed in the middle of the night, with no apparent provocation, and

has hunted up a new bed, all litered with forests, cornfields, brick houses, railroad ties, and telegraph poles. * * * Then it has suddenly taken a fancy to its old bed, which by this time has been filled with suburban architecture, and back it has gone with a whoop and a rush, as happy as if it had really found something worth while.

"Quite naturally this makes life along the Missouri a little bit uncertain. Ask the citizen of a Missouri river town on which side of the river he lives, and he will look worried and will say: 'On the east side when I came away.' Then he will go home to look the matter up, and, like as not, will find the river on the other side of his humble home, and a government steamboat pulling snags out of his erstwhile cabbage patch.

"It makes farming as fascinating as gambling, too. You never know whether you are going to harvest corn or catfish. The farmer may go blithely forth of a morning with a twine binder to cut his wheat, only to come back at noon for a trout-line—his wheat having gone down the river the night before.

"These facts lead us naturally to the subject of the Missouri's appetite. It is the hungriest river ever created. It is eating all the time—eating yellow clay banks and cornfields, eighty acres at a mouthful; winding up its banquet with a truck garden and picking its teeth with the timbers of a big red barn. Its yearly menu is ten thousand acres of good, rich farming land, several miles of railroad, a few hundred houses, a forest or two, and uncounted miles of sandbars.

"This sort of thing makes the Missouri Valley farmer philosophical in the extreme. The river may take away half his farm this year, but he feels sure that next year it will give him the whole farm of the fellow above him. But he must not be too certain. At this point the law steps in and does a more remarkable thing than the river itself may hope to accomplish. It decrees that so long as there is a single yard of an owner's land left—nay even so long as there is a strip wide enough to balance a calf upon—he is entitled to all the land that the river may deposit in front of it. But when that last yard is eaten up, even though the river may repent and replace the farm in as good order as when it took it, the land belongs to the owner of the land behind it."—The Docket.